Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	WC Docket No. 07-245
Policies Governing Pole Attachments	)	

REPLY DECLARATION OF VERONICA MAHANGER MACPHEE

I, Veronica Mahanger MacPhee, hereby declare the following:

INTRODUCTION

1. I am the owner of Mahanger Consulting Associates ("MCA"), through which I provide consulting services to telephone and cable television companies in the United States and Canada. I submitted a Declaration in support of the comments of AT&T Inc. ("AT&T") in this proceeding. The purpose of my Reply Declaration is to respond to: (i) arguments raised by commenters in connection with the Commission's tentative conclusion to establish a uniform broadband pole attachment rate; and (ii) their desire to exclude incumbent local exchange carriers ("ILECs") from the benefits of such a rate. My Reply Declaration also responds to proposals to modify the Commission's pole attachment formulas and to establish Commission rules to deal with unauthorized attachments. Finally, my Reply Declaration addresses the regulation of pole attachment rates by various states.

THE COMMISSION SHOULD ESTABLISH A UNIFORM BROADBAND POLE ATTACHMENT RATE

2. Electric Utility Companies ("ELCOs") ostensibly support the establishment of a uniform broadband pole attachment rate, yet urge the Commission not to extend that rate to ILEC attachments and insist that the pole rental rates paid by ILECs under existing joint use agreements should not be disturbed.[1] The ELCOs' motivation is clear: they want to preserve the lucrative rental rates paid by ILECs pursuant to obsolete rate arrangements in these decades-old joint use agreements. While the ELCOs uniformly assure the Commission that their rate structures with ILECs are fair, the facts demonstrate otherwise. The record is similarly clear that ILECs, such as AT&T, face ubiquitous ELCO demands for ever-increasing pole attachment rates – not because the costs of poles are increasing exponentially, but rather because pole ownership and pole usage have changed in ways that favor solely the ELCOs. At the same time, ELCOs resist updating their joint use agreements with the ILECs to reflect these changed conditions.

3. Alabama Power points to the more than 75-year history of joint use agreements between electric utilities and ILECs, which prescribed reasonable terms and conditions for the relationship between local telephone and electric companies.[2] Similarly, Alabama Power, Florida Power and Light,Tampa Electric Company, and Oncor Electric Delivery Company insist that because ILECs own poles they are somehow on par with the electric utilities and

[1] See Comments of (i) Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, pp. 6-14, (ii) the Coalition of Concerned Utilities (Allegheny Power et al.), pp. 61-70, (iii) the Edison Electric Institute and the Utilities Telecom Council, pp. 48-54, (iv) Oncor Electric Delivery Company, pp. 23-30, (v) Pacificorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation, pp. 3-7, (vi) the Utilities Telecom Council, pp. 17-20.

[2] Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, pp. 11.

have equal bargaining power.[3] Simply put, with ELCO pole ownership currently standing at some 75 to 80 percent of utility poles across the country, and ILECs owning only 20 to 25 percent of such poles, ILECs do not enjoy equal bargaining power with the electric utilities.[4]

4. That ILECs enjoy little or no bargaining power when it comes to pole attachment rates is evidenced by the fact that ELCOs routinely refuse to reduce the ILECs' obsolete cost allocation percentages in existing joint use agreements to reflect the increasing utilization of a joint pole's communications space by multiple other pole users, and the corresponding revenue stream flowing to the ELCOs. These ILEC cost-allocation percentages typically range from 40 percent to 50 percent of the cost of a joint pole, which means that ILECs pay 40 percent to 50 percent of the ELCOs pole costs. These payments are supposed to reflect the reservation of some 3 feet of pole space for ILEC use. However, the ELCOs continue to collect these percentages of their costs from the ILECs, while also receiving payment of 7.4 percent of their costs from CATV companies under the FCC cable formula, 11.2 percent (on urbanized five-user poles) to 16.9 percent (on non-urbanized three-user poles) from telecom companies under the FCC telecom formula, and unknown amounts from miscellaneous other pole users – for the use of some two-thirds of the very same space the ILEC is paying 40 percent to 50 percent for under the terms of joint use agreements. This is a clear case of double-dipping on the part of the ELCOs and is obviously inequitable. The

[3] Florida Power & Light and Tampa Electric, p. 8; Oncor Electric Delivery Company, pp. 26-28; Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, pp. 10. Actually, Oncor states that the ILECs have not lost any bargaining power since 1996, implicitly suggesting or conceding that ILECs may have lost such bargaining power well before 1996, which they in fact did.

[4] *See, e.g.*, Letter Comments of the Public Utility Commission of Oregon, at 2 (confirming that electric companies own 75% of the poles in Oregon that support both high voltage and communications networks).

ELCOs' insistence on preserving the status quo is the reason AT&T and the other ILECs have been forced to seek the intervention of the Commission.

5. AT&T has previously explained the reasons for the current pole ownership disparity between the ELCOs and the ILECs, which include factors beyond the control of AT&T and other ILECs. Quite possibly the most significant reason the disparity has increased over time has been the historical primacy of electric service over telephone service. The former has always been considered a necessity, the latter for many years a luxury. This fundamental difference has dictated that the electric industry is called first to set – and thus to own – the joint use poles. The resulting divergence in pole ownership over 75 years is thus a consequence of the simple fundamental difference between electric and telephone service, and not any abrogation by ILECs of an obligation to set poles.

6. The demise of the conceptual underpinnings for setting pole attachment rates under traditional joint use agreements began with the advent of cable television in the 1970s. When Congress passed legislation in 1978 to require that utilities permit CATV attachments on their poles, the result was twofold: first, CATV operators gained and ILECs lost a foot of the communications space on the historical two-party pole previously reserved for ILEC use under existing joint use agreements; and, second, ILECs were obliged under the cost-sharing terms of those joint use agreements to share the cost of the poles that accommodated CATV. Meanwhile, even though ILEC space requirements on utility poles shrank with the evolution of communications technology, ELCO space requirements have effectively doubled from their own early allocation of 4 feet of space for cable attachments, necessitating taller poles for ELCO use. Despite these significant changes in pole size and usage, ILECs typically received: (i) no adjustment to or offset of their contribution to costs under the cost-sharing provisions of

the ILEC/ELCO joint use agreements; (ii) no adjustment to or offset of the pole rental rates ILECs paid under those agreements: and (iii) no opportunity to share in the income generated by the simultaneous use of their space.[5]

7. Since 1996, the number of pole users has only continued to proliferate, which has only exacerbated the problems experienced by ILECs with respect to pole attachment rates under traditional joint use agreements. ILECs incur a double detriment – they have suffered accelerating loss of their allocated communications pole space even as the escalating demand for taller poles results in their continuing to subsidize electric, CATV and CLEC pole requirements through the obsolete cost-sharing provisions of their joint use agreements. Thus, ILEC joint use pole rental rates are counter-intuitive; although these changes should result in lower pole attachment rates under any basic cost causation principles, the pole rental rates that ILECs pay to ELCOs continue to skyrocket.

8. Edison Electric presents several purported justifications for perpetuating pole attachment rates under joint use agreements and exempting the ILECs from any broadband pole attachment rate developed by the Commission.[6] First, Edison Electric insists that ILECs enjoy contractually reserved space under their joint use agreements with ELCOs, providing them with flexibility. But this is patently not the case. ILECs stopped enjoying the protection of reserved space on ELCO poles – and in fact, on their own poles as well – when Congress dictated the subdivision of ILEC space for non-discriminatory access by CATV. It is the so-called "reserved" ILEC space on the two-party poles of early joint use that by congressional

5 In a very small number of joint use agreements the ILEC receives the revenue from CATV for the sublease of its space, but this arrangement is a rare exception. Since the owner of the pole almost always receives this revenue, it goes overwhelmingly to the electric companies as the owners of approximately 75-80% of the joint use poles.

6 See Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 50-52.

mandate was occupied after 1978 by cable television, and since 1996 by new communications carriers. The ILEC gains little "flexibility" from, say, two feet of its "reserved" space that an ELCO has allocated to a CATV and a new communications carrier, and which as a consequence is simply unavailable to the ILEC – even though it is still paying for this same space under the terms of its joint use agreement. Now if the ILEC needs even one of the additional two feet of space ostensibly "reserved" for its use (but in reality reallocated to other parties), it will often need to request a pole change-out and bear its capital cost.

9. Second, Edison Electric argues that joint use agreements have been in effect for many years – an argument that, while true, is meaningless today as regards the pole rental rate construct.[7] It is beyond dispute that the rate provisions in joint use agreements executed years ago reflect assumptions that no longer hold true. The equal or joint "partnership" that once existed between local telephone and electric companies is a thing of the past. In the face of the number of additional users in the space their 40-50 percent cost allocation percentage once bought the local telephone company, it is unreasonable, unfair, and competitively discriminatory for ELCOs to continue to insist that ILECs continue paying close to 50 percent of ELCOs' pole costs.

10. Third, Edison Electric claims that, because joint use agreements involve the ownership of pole plant, they are "pervasively regulated under state and local laws and regulations" which, according to Edison Electric, would make it "very difficult, if not impossible, for the Commission to regulate pole attachment rates within the context of such

[7] See also Oncor Electric Delivery Company, pp. 24-25.

agreements ...."[8] This claim is without merit. To the extent a state has certified that it regulates pole attachment rates, the Commission does not regulate pole attachments in that state. However, many of those states that have certified to the FCC that they regulate pole attachments have deferred to the FCC in adopting rules that mirror those of the FCC. No exception exists for pole attachment rates that may happen to be set forth in a joint use agreement. Furthermore, the majority of states do not regulate pole attachment rates. Thus, the Commission has the authority and the duty to regulate pole attachment rates in the majority of the United States.

11. Fourth, Edison Electric argues that joint use agreements "impose a mutual obligation." This argument conveniently ignores that the mutuality concepts underlying pole attachment rates in traditional joint use agreements – that the pole would be used only by ELCOs and ILECs and that both pole ownership and space usage would be relatively equal – have long since evaporated.

12. The Coalition of Concerned Utilities' contention that electric utilities bear 100 percent of the cost of construction of the pole distribution systems is flatly incorrect.[9] The premise underlying joint use between telephone and electric companies, and governing the establishment of rates, has historically been the equitable allocation of the costs and benefits of joint use. This is so whether or not the agreement in question spelled out a specific formula for rate development or cost sharing. Where rate formulas in joint use agreements exist, they typically include the use and application of an annual charge component which represents the

[8] See Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 52-53.

[9] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), pp 22-23.

full cost to the pole owner to own and maintain a joint use pole, ***including the owner's cost of capital***. Most importantly, this means that the rental rates paid by ILECs pursuant to such formulas have been predicated upon the premise that the pole owner actually incurs no initial (or subsequent) capital outlay for joint use but, rather, borrows the total funds representing its capital investment in the pole, with the joint user paying its allocated share of the cost of money. In short, ILECs have been carrying some 40-50 percent of the cost of shared poles since the inception of joint use, including the cost of money to construct the entire joint pole plant, and irrespective of putative pole ownership.

13. Similarly, the FCC methodology allocates the full annual cost of a joint use pole fairly and reasonably among all pole users, including the cost of capital set at a default rate of 11.25 percent.

14. In its Comments, Comcast Corporation ("Comcast") insists that whatever broadband pole attachment rate the Commission ultimately develops, the ILECs do not deserve it.[10] Like the ELCOs, Comcast cites the "rights" ILECs enjoy under joint use agreements, including greater space occupied.[11] Comcast would of course be greatly advantaged from a competitive standpoint if it were allowed to continue paying far lower pole attachment rates than an ILEC with which it was in direct competition for broadband customers.

15. Any enjoyment by ILECs of special status or benefits as a consequence of those joint use agreements, including any notion of preferential space, is a thing of the past. Here is today's reality. Beginning in 1978, the 3 feet of space that was historically reserved for ILEC

[10] Comments of Comcast Corporation, pp 24-30.

[11] Id. at 27.

attachments on a pole began to be subdivided, lost to the ILECs by congressional mandate. It is in this prior ILEC space on a pole that Comcast's cable is attached. Those 3 feet of pole space originally reserved to the ILEC are now routinely subdivided three ways, 1 foot each, among 3 competitors occupying the average joint use pole (the ILEC, the CATV operator, and a CLEC). In my experience working for some twenty years now with ILECs, large and small, and their joint use agreements with electric companies, when ILECs perform field surveys, they find that they are now occupying on average between 1 foot and 1.5 feet on a pole, not three feet. Yet they continue to pay exorbitant pole rental rates to the ELCOs based on the nearly 50/50 division of pole costs, a historical vestige deemed sacrosanct and untouchable by the ELCOs. The facts negate the fiction that ILECs still enjoy preferential treatment under joint use.

16. Comcast also cites the ILECs' right to access a pole without make-ready expenses as one of the "far greater rights" ILECs possess.[12] In fact, under the "Division of Costs" provisions of most joint use agreements ILEC pole owners have been providing poles tall enough to support expanding electric attachments since the inception of joint use, now typically 40-foot poles, only to have their own space on both their own and ELCOs' poles systematically eroded. At the same time, obsolete rates arrangements in those joint use agreements still require ILECs to defray some 40-50 percent of the cost of ELCO-owned joint use poles in the form of annual rental rates. Thus, rather than incurring intermittent, episodic costs, the ILECs bear the ongoing expense of subsidizing their competitors like Comcast as well as the ELCO pole owners.

[12] Id.

17. And as ELCOs present new agreements to the ILECs, those agreements are no longer "joint" in any sense remotely related to the ILECs' special status of old. They are attachment agreements just like those accorded to Comcast and other communications carriers, with one notable exception – preservation of the obsolete 40-50 percent rate structures of historical joint use agreements.

18. Notwithstanding ELCO claims to the contrary, ILECs are not seeking to avoid their fair share of costs. Rather, they seek treatment on a level playing field and to pay their equitable, reasonable and consistent allocation of the cost of a standard pole. The loss by the ILECs of their historical reserved space as a joint user with no abatement of their rental rates, the corresponding escalation of electric utility revenue from simultaneous use of that space by competitors, the proliferation of competitive carriers currently enjoying the same pole usage benefit for much less cost, and the ownership of the vast majority of poles by the nation's electric utilities, all dictate this result.

THE COMMISSION SHOULD REJECT ELCOS' PROPOSED CHANGES TO THE CURRENT POLE ATTACHMENT FORMULAS

19. Conveniently, the ELCOs want to preserve their ability to exact unjust and unreasonable pole attachment rentals from ILECs while advocating various adjustments to the FCC's pole attachment formulas which, if adopted, would inflate the maximum pole attachment rates for their dual rental of ILEC pole space permitted under the FCC's rules. After cutting through the dross, the ELCO proposals with respect to the FCC's pole attachment formulas can be reduced to five main recommendations: (i) reduce the number of pole users to three in urbanized and non-urbanized locations; (ii) reclassify the separation space on every

joint use pole as non-usable; (iii) allocate the non-usable space, including the separation space, equally to all pole users; (iv) alternatively, not count the ELCO as an attaching entity that shares the cost of the telecom formula's two-thirds of the non-usable space; and (v) eliminate the "subsidies" of other users that ELCOs claim permeate the rental rate methodology. Each of these proposals is intended to increase a non-electric pole attacher's allocated percentage of space and cost, thereby increasing the pole attachment rates that result from the Commission's methodology. Applied in conjunction, these proposals would result in a compounded increase in pole rental rates. They are without merit and should be rejected summarily by the Commission.

(a) Reduce the number of pole users to three in both urban and non-urbanized locations

20. ELCOs dispute the accuracy of the current FCC presumptions concerning the number of attachers on a utility pole, recommending that the number of pole users be reduced to three in all locations, both urbanized and non-urbanized.[13] According to the ELCOs, the FCC's formulas – which apply a presumption of five pole users in urbanized locations (50,000 or greater population), and 3 in non-urbanized locations (less than 50,000 population) – do not accurately reflect reality.[14] Decreasing the number of users to three in all locations would increase maximum pole attachment rates. Fewer users sharing in the allocation of space means more space allocated to each, which in turn increases the share of its cost the ELCO can pass on to each user.

[13] See Comments of Florida Power and Light and Tampa Electric Company, pp. 16; see also Comments of the Utilities Telecom Council, p. 22-24.

[14] See Comments of Florida Power and Light and Tampa Electric Company, pp. 14-16.

21. AT&T agrees with the ELCOs that the Commission should abandon its "urbanized" versus "non-urbanized" dichotomy and should establish a single presumption for attachers on a pole, regardless of location. AT&T proposes that the presumed number of attachers should be 4, which is a blend of the Commission's current 3-user / 5-user approach. With the average pole likely to carry an ELCO, an ILEC, a CATV operator, and at least one CLEC or other telecommunications or broadband carrier, a four-user configuration seems most defensible. While the ELCOs recommend that the Commission presume three attachers on a pole, this configuration stopped being the norm when CATV ceased being the only third-party attacher to utility poles.

22. The data offered by the ELCOs do not support the Commission's reducing the number of presumed pole attachers to three (including the ELCO's attachments) in urban areas. For example, the Utilities Telecom Council argues that the utilities it surveyed reported, on average, "that almost 70% of their poles in metropolitan areas have three or fewer attachments."[15] But this argument is premised on data from a survey of investor-owned as well as *municipal and cooperatively owned electric utilities*,[16] even though municipal and cooperatively owned utilities are not subject to the requirements of section 224, including the statutory obligation to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Because municipal and cooperatively owned electric utilities have no obligation under federal law to provide access to poles that they own or control, it

[15] See Comments of the Utilities Telecom Council, p.9.

[16] Utilities Telecom Council Whitepaper at 2 (noting that its "survey was sent to all kinds of utilities, including investor-owned, municipal and cooperatively organized utilities").

should come as no surprise that there are fewer attachments on such poles, and including municipal and co-op pole attachment data with investor-owned utilities unfairly skews the results.

23. Furthermore, the data provided by the Utilities Telecom Council is difficult to reconcile with pole attachment data provided by the Coalition of Concerned Utilities, whose Comments include a table purporting to reflect the number of attaching entities per pole owned in whole or in part by the ten electric utility companies and their subsidiaries that comprise the Coalition. Table 1 to the Coalition's comments (p.15) reflects that approximately 73 percent of the jointly occupied poles owned in whole or in part by these electric utilities have three or more attachments (including ELCO attachments). The Coalition's pole attachment data also appear to be understated because, for reasons not explained in its Comments, nearly 2 million poles owed in whole or in part by Coalition members were excluded.[17]

24. Florida Power & Light (FPL) and Tampa Electric also offer information concerning the average number of attaching entities, but this information is presented in conclusory format with no underlying detail. For example, FPL claims (p.16) that the "average number of attachments per pole (including FPL) is slightly more than two (2)." However, it appears that this figure was derived, in part, by dividing the total number of second and third party attachments (1.16 million) by the total number of distribution poles (1.14 million).[18] This approach is misguided because it calculates an average number of attachers per pole, not based only on FPL's total jointly occupied poles, but rather based on an average of ***all*** the poles it

[17] Compare Comments of Coalition of Concerned Utilities (Allegheny Power et al.), Table 1 (p.15), which lists National Grid with 762,690 poles and omits NSTAR, with Table 2 (p.52), which lists National Grid has owning in whole or in part 2,303,700 poles and identifies NSTAR as owning in whole or in part 388,000 poles.

[18] Declaration of Thomas J. Kennedy ¶ 19.

owns, that is, including those poles which it occupies alone. In fact, FPL admits that it "cannot identify the number of attaching entities on any particular pole or any specific subset of poles,"[19] which calls into serious question the accuracy or pertinence of FPL's data. The same problems appear to underlie Tampa Electric's claim that the average number of attaching entities for its poles is 2.08,[20] which appears incredibly low given the number of ILEC attachments, the prevalence across the country of at least one additional user – CATV – since 1978, and proliferating numbers of new pole users since 1996.

(b) Reclassify the separation space on every jointly occupied pole as non-usable

25. ELCOs continue to urge the FCC to reclassify the separation space on a pole as non-usable.[21] This change would have the effect of increasing the pole's total non-usable space and correspondingly decreasing its total usable space. There is no plausible justification to do so. Since under the telecom formula at least, a greater proportion of the pole's non-usable space than its usable space is allocated to an attacher on the pole, the ELCOs' proposal to increase the non-usable space would have the corresponding effect of disproportionately increasing each user's allocation of that space. Under the telecom formula, once the separation space is declared non-usable, two-thirds of its cost is shared equally by the pole users. It should be remembered here that 40-50 percent of the total pole is already being paid for by the ILECs pursuant to existing joint use agreements, which further undermines ELCO claims that their proposed adjustments are necessary to eliminate "competition-distorting subsidies at the

[19] *Id.*

[20] Declaration of Kristina Angiulli ¶ 18.

[21] See Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 103-104.

expense of electric consumers."[22] This effort to reduce the ELCOs' expenses should be rejected.

26. The Coalition also points to a rate formula adopted in Seattle, Washington as supporting the proposition that the separation space is non-usable and thus part of the common space, despite its clear benefit to the ELCOs.[23] Under the Seattle formula as cited by the Coalition, there are 10 feet of usable space and 27.5 feet of common space on the presumptive 37.5 foot pole, including the separation space, which the Coalition refers to as the "communication worker safety zone." As discussed below, however, the Seattle formula as described by the ELCOs was in effect for only two years and hardly provides justification for the ELCO proposal to designate the separation space as non-usable.

27. Edison Electric also calls the separation space the "communications worker safety zone," and offers, as reason for its existence, the provision of safety for the communications workers who must access the poles.[24] This may be a misnomer, but, regardless, completely misses the point. What drives the safety need here is the worker's proximity to energized electric supply lines as Edison Electric itself concedes. Although Edison Electric contends that there would be no need for the safety separation space in the absence of the communications attachments, the converse is obvious: there would be no need for the safety space in the absence of ELCOs' inherently dangerous electrified facilities. On poles occupied by communications companies alone, there is no "communications worker safety zone."

[22] Comments of the Edison Electric Institute and the Utilities Telecom Council, p. 102.

[23] Id. at 26-28.

[24] Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 103-104.

28. Furthermore, the ELCOs actually use this space for the placement of electric facilities, while the communications companies do not. Alabama Power and other ELCO statements that this space is unavailable for use by the [electric] utility is simply wrong.[25] ELCOs receive direct income from use of this space, such as revenue from streetlights. The Commission repeatedly has rejected ELCO attempts to designate the separation space as non-usable, recognizing consistently that this neutral zone is usable space and is actually used by electric companies. Nearly 30 years ago, the Commission made this finding:

> *[W]e note the common practice of electric utility companies to make resourceful use of this safety space by mounting street light support brackets, step-down distribution transformers, and grounded, shielded power conductors therein. While this practice may be more prevalent in urban areas and may vary from company to company, the 40 inches does appear to be of practical benefit to the electric utility. In accordance with the foregoing, we reject the position represented by Edison, Florida, New Orleans, Southwestern and Teleservice to the extent it would assign part of the safety space to CATV. Suggestions that the safety space be entirely excluded in the determination of usable space must be similarly rejected.*[26]

The commission reinforced this position again in 2001 by finding:

> *UTC/EEI continues to urge that we consider as unusable the 40-inch safety space that exists to minimize the likelihood of physical contact between employees working on cable television or telephone lines and the potentially lethal voltage carried by the electric lines, as well as to prevent electrical contact between such cables. No new arguments or evidence was presented in the filings and based on our previous reasoning, that the space is usable and used by the electric utility, we reject arguments to reduce the presumptive usable space of 13.5 feet by 40 inches.*[27]

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[25] Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power, pp. 24-25.

[26] Memorandum Opinion and Second Report and Order, Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, FCC 79-308, 72 F.C.C.2d, (May 23, 1979).

[27] *In the Matter of Implementation of Section 703(E) of the Telecommunications Act of 1996*, 16 FCC Rcd 12103, ¶ 51 (2001) ("Reconsideration Order").

There is no reason for the Commission to alter its consistent stance on this issue, and the ELCOs offer none.

(c) Allocate the non-usable space, including the separation space, equally to all pole users

29. Several ELCOs contend that all of the non-usable space should be divided equally among its users, not just two-thirds of it as is the case under the current telecom rate formula. Again, as is the case with the ELCOs' other proposals – this recommendation has a singular purpose – to increase each pole user's share of the pole's space, and correspondingly, increase the rate each user pays the ELCO pole owner.

30. In support of its proposed adjustment that all non-usable space should be divided equally among its users, the Coalition of Concerned Utilities points to a measure adopted by the House of Representatives prior to passage of the 1996 Act which would have allocated 100% of the non-usable space equally among all attachers.[28] Of course, this measure was not adopted into law, and the modifications to section 224 adopted by Congress in 1996 did not follow this approach. That Congress rejected the allocation of all non-usable space equally among its users underscores the need for the Commission to do likewise.

31. In addition, the Coalition cites the Seattle rate formula as also supporting the proposition that the non-usable space should be shared equally.[29] It devotes extensive attention to a 1998 ruling of the Superior Court of King County, Washington, which observed that Seattle's 1995 equal allocation of the costs associated with the support space was, in the words

[28] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), pp. 35-36.

[29] Id. at 26-28.

of the court as quoted by the Coalition, "eminently reasonable."[30] However, the Coalition neglects to mention that Seattle subsequently amended its rate formula two years later, in 1997, adopting at that time the FCC telecom formula's allocation of two-thirds of the common space.[31]

32. The fundamental defect in any approach that allocates the total cost of a joint pole's non-usable space in any manner other than in direct proportion to the users' respective allocations of the pole's useful space is that any such approach fails to reflect the vast disparity between ELCO use of the pole's usable space and its use by any other attacher. The Commission has determined that a standard pole has 13.5 feet of usable space. This means that, for a standard ELCO pole with two additional attachers (an ILEC, and a CATV or CLEC), the ELCO alone is using 10.5 feet of usable space, to the ILEC's 2 feet,[32] and the CATV/CLEC's 1 foot; on a standard ELCO pole with five attachers, the four non-ELCO attachers are collectively using 5 feet, while the ELCO alone is using 8.5 feet. To allocate the cost of the pole's common space equally, or even nearly equally, is unfair and unreasonable.

33. The analogy of a shared office building might serve to demonstrate this point. If there were 14 floors to the building, and one tenant alone occupied 11 of them, with two other tenants occupying 1 and 2 floors respectively, it would be inconceivable for the three tenants of the building to share its common costs – e.g., parking facilities, janitorial services,

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[30] Id at 27-28.

[31] See *TCI Cablevision of Washington, Inc. v. City of Seattle,* No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Superior Ct., King County), provided as Exhibit A of the Coalition's Comments. Specifically, see Conclusion of Law No. 45, slip op. at 24.

[32] This usable space usage is actually overstated. AT&T has found its actual average pole use to be approximately 1 foot to 1.5 ft.

electricity, heat, etc. – equally. These common costs would be most fairly and reasonably allocated in direct proportion to the number of floors each tenant occupied, since this would be a fair and reasonable reflection of the relative benefit each tenant obtains from the building's shared or common support services. No less is true of a shared joint use pole, and the equal allocation of its common space that is consistently recommended by the ELCOs is unreasonable and insupportable.

34. The defects in the Coalition's contradictory position – that non-usable should be shared equally while usable space should be shared in proportion to use – can be easily demonstrated. Using the Commission's presumptions of 13.5 feet of usable space and 24 feet of non-usable space, the Coalition would have the entire 24 feet be shared equally by the pole's attachers. If there are just three presumptive attachers as the ELCOs are also recommending (the ELCO pole owner, an ILEC attacher, and one third party, either CATV or CLEC), the resulting allocations of space would be as follows: ELCO 18.5 feet (10.5 + 8) or 49.33 percent; ILEC 10 feet (2 + 8) or 26.67 percent; and CATV or CLEC 9 feet (1 + 8) or 24 percent. Hypothetically, however, if in addition to allocating the non-usable space equally, *the usable space were also allocated equally* – that is, 4.5 feet to each attacher – each party on the pole would pay 33.33%. The ILEC percentage would thus increase by just 6.66% for 2.5 feet more, or more than double its usable space, and the CATV/CLEC percentage would increase by just 9.33% for 3.5 feet more, or three and a half times its usable space.

35. Such an across-the-board equal distribution of pole space and costs is an option these two pole attachers might well prefer, since the doubled or tripled (or more) usable space they would thus acquire would be theirs to reallocate or redistribute as they see fit – including perhaps via a lease-back arrangement with the ELCO pole owner that requires more

pole space to accommodate its attachments. After all, if it is fair and reasonable to allocate the common space equally among three attachers, as these ELCOs are recommending, it follows that it would be demonstrably fair and reasonable to allocate the usable space equally also. This is the ELCOs' argument for equal distribution of the non-usable space taken to its logical conclusion, but the corresponding equal distribution of the usable space, with all its implications, is an arrangement the ELCOs likely would reject out of hand.

(d) Alternatively, not count the ELCO as an attaching entity that shares the cost of the non-usable space

36. Other ELCOs ask the Commission to count only the operators of cable systems or providers of telecommunications services as attaching entities – that is, not to count the ELCO on the pole as an attaching entity – for purposes of assigning the cost of the telecom formula's two-thirds of the common space.[33] To not count the ELCO as an attacher for purposes of allocating the formula's two-thirds of the common space would reduce the ELCO pole owner's total share of the common space (and therefore cost) to the telecom formula's unallocated one-third. Fewer attachers sharing the remaining two-thirds of the non-usable space would correspondingly increase the space allocated to each, compounding the effect of the ELCOs' recommendations.

37. In recommending that their own space (and cost) allocation be reduced to the unallocated one-third of the pole's common space, EEI and the UTC nonetheless seem to consider that it would be quite appropriate for the FCC to continue to include the ILECs as

[33] Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 79-80; see also comments of the Utilities Telecom Council, pp. 105-106.

attaching entities for purposes of allocating the remaining two-thirds of the common space.[34] This would mean that an ILEC as the pole's owner would not only absorb the cost of the unallocated one-third of a pole's common space, *but would then be counted again for purposes of allocating the remaining two-thirds,* unlike the ELCO pole owner. The Commission should recognize the inherent contradiction and obvious inequity in the ELCOs' recommendation, and dismiss it from consideration.

(e) Eliminate the "subsidies" of other users that permeate the rental rate methodology

38. Finally, the ELCOs insist that their current rates provide non-specific "subsidies" to the attachers on their poles which need to be eliminated.[35] PacifiCorp and other commenters state that at the very least this unfair burden should be redressed by applying the telecom formula across the board.

39. The ELCOs continually assert that they are "subsidizing" the other users of their poles. This assertion is impossible to reconcile with the fact that ECLOs usually recover in advance their costs in the form of "make ready" work to accommodate a new attacher. This total up-front reimbursement of any cost, capital or expense, incurred by the owner to accommodate the new pole user makes a pole owner absolutely whole at the very beginning of the new attacher's occupancy. To state this in terms of its financial impact on the pole owner, full up-front reimbursement means that the owner's capital investment with respect to the new user's attachment is nil – $0.00. An investment of $0.00 multiplied by ***any*** annual carrying charge percentage is also $0.00; in other words, a pole owner incurs absolutely no annual

[34] Id. at 106.

[35] Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 92-93; see also Comments of PacifiCorp, Wisconsin Electric Power Company, and Wisconsin Public Service Corporation, p. 84.

carrying cost for its capital investment in make-ready for which it has been reimbursed. And if the new attachment is accommodated on a pole with just rearrangement of facilities (the expense of which generally is also charged to the new attacher up front) the pole owner has once again incurred no new investment and thus no increased annual carrying cost with respect to that pole – and has also not incurred any expense to accommodate the new attacher – and thus not even an incremental cost.

40. This reality completely contradicts the Coalition's representation that electric utilities bear 100 percent of the cost of joint pole systems, or that cable and communications companies do not contribute a single penny to the initial construction of these systems.[36] As pointed out earlier, the rate methodology's provision for the allocation to a pole user of its designated share of the owner's entire cost of capital percentage on its full embedded investment means this user is contributing – effectively, "borrowing" – each year in its per-pole rental rate, the money for its share of the capital investment in every pole it occupies.

41. What all of this means is that any contribution at all to the annual carrying charges by pole attachers is in fact a financial boon for the utility pole owner. This applies in particular to occupancy by the ILECs, who have since 1978 continued to reimburse the ELCOs for some 40-50 percent of their costs in the face of, and without offset for, the rental revenue flowing to the ELCOs from third party attachers. Those third party attachers offset varying percentages of ELCO costs – CATV 7.4 percent, telecom urbanized 11.2 percent , and telecom non-urbanized 16.9 percent, respectively – for the privilege of occupying a single foot of their poles. The Commission should not be persuaded by the spurious arguments of the ELCOs,

[36] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), pp 22-23.

which continue to insist that they are somehow subsidizing other pole users.[37] Quite the reverse is true. If ELCOs were paid a rate based on some 25 percent of their costs, as they seem to believe is fair,[38] a mere four attachers on an ELCO pole would contribute 100 percent of the ELCO's annual carrying cost, which would amount to 100 percent subsidization of the ELCO.

42. The Commission may wish to consider the current disregard by utility pole owners for the articulated range of rates actually called for by the Pole Attachment Act. Both of the Commission's existing formulas are actually intended to articulate the ***high*** end of a range of rates, the low end of which is the same under both formulas: the incremental cost to a pole owner to accommodate the new attachment on its pole. No pole owner of which I am aware charges rates based on the incremental costs of providing pole attachment space, rendering the formulas' ranges essentially and effectively meaningless. The excessive rates which the ELCOs demand would indeed result in subsidization, but of the ELCOs, not their pole attachers.

THE COMMISSION SHOULD REJECT ELCOS' PROPOSALS TO ADDRESS UNAUTHORIZED ATTACHMENTS

43. Among various miscellaneous charges they seek to impose, Edison Electric and others urge the Commission to adopt penalties for both "unauthorized attachments" and "safety

[37] Comments of the Edison Electric Institute and the Utilities Telecom Council, p. 94.

[38] The percentage of their pole costs that ELCOs appear to endorse as reasonably defrayed by each user on their poles appears to center around 25 percent.

violations."[39] Typically, an "unauthorized attachment" is an attachment to a pole that is not on the list of poles for which an attacher is paying rent, but which comes to light during the course of a pole audit or inventory by the owner. A "safety violation" exists when an attachment is deemed not to meet the requirements of the National Electrical Safety Code (NESC) or an ELCO's own internal policies. The Coalition of Concerned Utilities proposes assessing penalties as high as $100 per pole for such unlisted pole attachments and $200 per pole for purported safety violations.[40]

44. With respect to the ILECs, the issue of "unauthorized attachments" is not as simplistic as the ELCOs would have the Commission believe. By definition, any difference established during a pole audit or inventory between the number of poles for which a user is paying the pole owner, and the number of poles to which that user is actually attached, is considered to represent "unauthorized attachments." However, a mere difference in pole count does not an unauthorized attachment make. As set forth below, there are many ways that such disparities can be created that are beyond the control of the ILECs and are often actually the responsibility of the ELCOs. And the ELCOs seek to profit from each scenario.

45. For example, one problem with which ILECs have had to contend since the inception of joint use and which has contributed substantially to the present pole ownership disparity is "overbuilding" by the ELCOs. Overbuilding is the ELCO practice of placing taller poles right beside ILEC-owned poles without providing any notice or request to the ILEC to

[39] Comments of the Edison Electric Institute and the Utilities Telecom Council, pp. 79-80; see also comments of the Utilities Telecom Council, pp. 79-81.

[40] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), p. iv, and pp. 71-79.

change out the poles, thereby forcing the ILEC pole owner to transfer its attachments to the new pole and pull its own pole. If this happens to a line of 25 poles, ILEC ownership switches to the ELCO, and at the next inventory the telephone company will be found to own 25 less poles, while the ELCO owns 25 more. There is also as a consequence a new 25 pole deficiency in reported attachments to the ELCO's poles attributed to the ILEC, which are deemed to be at the ELCO's own manufacture "unauthorized attachments," which is nonsensical not to mention unfair. There is already an accompanying net negative expense impact for the ILEC of 50 poles – 25 less from which it will receive rental payments from the ELCO, and 25 more for which it must now make rental payments to the ELCO. It would be patently unreasonable for the ILEC to pay a penalty for attachments that are allegedly "unauthorized" by virtue of the ELCO appropriating its poles.

46. Second, other historical factors cloud the matter of pole ownership as between ELCOs and ILECs and militate against the establishment of penalties for "unauthorized attachments." A switch in pole ownership can also often occur when ELCOs change out poles in an emergency. Because their electrified facilities present a clear and present danger to the public, ELCOs are called first to replace their facilities and clear the area if a jointly occupied pole is brought down in bad weather or some other emergency situation. Since the replacement pole comes from the ELCO pole yard, its markings identify the ELCO as its owner, even if the pole it replaces actually belonged to the ILEC. The ILEC would have to be notified by the ELCO that the pole switch occurred, and would then have to replace the ELCO's pole tag in the field to its own identifying tag. In reality, the ILEC is often not advised of the change-out; thus, as a consequence, another pole's ownership changes hands.

47. Third, this same phenomenon – ELCO change-out and appropriation of ILEC poles – occurs in non-emergencies as well. Under the terms of many of their joint use agreements with ILECs, ELCOs are required to pay for the cost of changing out an existing ILEC pole if they need a taller or stronger pole to accommodate additional attachments. As might be expected, this requirement comes up time and time again as the ELCOs' need for pole space has expanded in conjunction with the expansion of the electric industry. (The same has clearly not happened with the ILECs, whose need for pole space has contracted, not expanded.) In such cases the ELCO often simply replaces the existing ILEC pole itself, and assumes its ownership. The ELCO assumption of the ownership of such poles does not come to light until the next pole audit, when the phenomenon registers itself as a pole ownership disparity with both the ELCO and the ILEC claiming ownership – and worse, with the ELCO claiming the existence of an "unauthorized attachment."

48. Fourth, AT&T also, increasingly, has found that drop attachments are a newly-created source of dispute. The vast majority of joint use agreements defined only distribution cable as a joint use attachment, so that incidental or peripheral attachments were not chargeable attachments. In AT&T's experience ELCOs have begun, unilaterally, to consider these as chargeable attachments, in direct contravention of the terms of the underlying joint use agreement. As such, they are now also counted as "unauthorized." There are ongoing disputes as to the ownership of drop poles as well, with both companies contending that it owns the pole.

49. Fifth, some current ILEC/ELCO joint use agreements do not require pre- or post-attachment notification, and true-ups only occur when both parties agree to a joint pole survey. This practice can leave pole counts constant for years. The establishment of a penalty

system today would likely result in a spate of electric company surveys, heretofore not deemed required, in pursuit of the potential financial rewards of newly created "unauthorized" and/or "safety" penalties.

50. The matter of safety is the second major prong of the ELCOs' proposals to acquire the right to assess random charges. In AT&T's experience ELCOs often cite AT&T for "safety violations" that actually are caused by their own arbitrary addition of a foot of space beyond the NESC requirements to the ground clearance the ELCOs require.

51. It also is a common practice for electric companies to hire consultants to inventory and conduct a "safety audit" of their entire plant, or a large portion thereof, frequently consisting of several hundred poles at a time. In AT&T's experience, these non-company consultants tend to raise every conceivable "safety violation" they can think of, sometimes even contrary to the NESC guidelines. Moreover, the alleged "safety violations" cited during the audit are not necessarily caused by ILECs but, rather, by communications providers and the ELCOs. For example, an attachment may have been properly placed on an electric company's pole at the time of installation, yet subsequent placement of an attachment by a different attaching entity may create the perceived "safety violation." Similarly, a safety violation can occur through no fault of an ILEC when an electric company subsequently places facilities such as a transformer onto the pole within the safety zone. Under such circumstances forcing an attaching entity which is not responsible for the alleged violation to "correct" it or to pay a "penalty" for its failure to do so would be unreasonable and unduly harsh.

52. The contract company hired to perform safety audits generally errs on the side of overinclusion when identifying alleged violations in order to protect itself from potential

liability. This can sometimes result in hundreds of unnecessary and costly pole reviews on non-issues by the alleged violators. The possibilities are endless. An attachment may have been in compliance based on the NESC at the time of placement; such attachments are grandfathered until it is time to make changes to them. It is impossible to identify which specific attachment created the non-compliant condition. The non-compliance may have been brought about by the electric pole owner. Just sorting out the legitimacy, or lack thereof, of the allegations can present attachers with a logistical burden.

53. From a practical, manpower standpoint, it is equally important to recognize that electric company "safety audits" may involve reams of documents noting the alleged violations. Investigating such alleged "safety violations" is itself an onerous task. AT&T's personnel must visit every pole identified in the audit to determine whether there is, in fact, a safety violation. This is a time-consuming process, and in a number of cases AT&T fails to agree with the opinion of the electric company's consultant regarding the alleged violation, its validity, its cause, or the party responsible for its correction. AT&T and other attaching entities must have the right to challenge and resist erroneous "safety" determinations.

54. The Coalition of Concerned Utilities cites the experience of Portland General Electric in Oregon with respect to unauthorized attachments. The Coalition provided a PGE PowerPoint graph as Exhibit C to its Comments, which purports to show that PGE experienced an extraordinary drop in the rate of "unauthorized attachments" from 30 percent in 1996 to 1 percent in 2007, following the imposition of sanctions in Oregon.[41]

[41] Id. at 78.

55. PGE's data explain little, as this reduction may be attributable to other factors beyond the Oregon Public Utilities Commission's ("PUC") imposition of sanctions, if it in fact occurred as reported by PGE. Without knowing the dimensions of PGE's study, or even how PGE interpreted and applied the Oregon sanction provisions, its validity cannot be assessed. What is known is that in 2007, the Oregon Public Utility Commission revised its sanction provisions, expressing its own concern that pole owners may abuse sanctions as a source of revenue.[42] The generation of revenue certainly seems to be behind the Coalition's recommendation that pole owners be allowed to assess as "imposition costs" their actual costs plus an additional 50 percent when they are required to do work that attachers have failed to do themselves,[43] a vague, all-encompassing designation into which just about any attacher could be ensnared at just about any time. The amendments the Oregon PUC enacted in 2007 were clearly intended to guard against potential abuses by providing grace periods and safe harbor provisions with respect to sanctions – something ELCOs self-serving proposals in this proceeding completely ignore.

56. There cannot be blanket authority accorded the electric companies by the Commission to assert either "unauthorized attachments" or "safety violations," and then proceed to assess penalties and sanctions for them. Such authority would assume not only that the electric companies are always right in their allegations as to both the existence of the perceived problem and its cause, but also that they themselves are never the cause. This is clearly not the case. In fact, as simple an error as failed record keeping on the part of an

[42] This April 10, 2007 Oregon PUC ruling has been provided to the Commission by the Oregon PUC as an attachment to its Comments.

[43] Id. at iv.

electric company – for example, failure to make a record of an attachment with respect to which it has actually been notified – may be the reason the attachment goes unrecorded and is thus allegedly "unauthorized." The Commission should resist the ELCOs' recommendation to impose sanctions and penalties, recognizing that pole sharing is a complex endeavor best addressed by cooperative policies and systems, not punitive penalties and sanctions.

STATE POLE ATTACHMENT REGULATION

57. To date, nineteen states and the District of Columbia have certified to the FCC that they have asserted jurisdiction over the regulation of pole attachments, but only a few of these have extended their application to all pole users, including the ILECs and the ELCOs. The Coalition of Concerned Utilities (Allegheny Power et al.) cites several formulas adopted for universal application by certain states, but they do so selectively, citing only those rules that support their position, and ignoring the factors that fail to support their contentions even within the formulas they cite.

58. In its comments the Coalition recommends that the Commission adopt the calculation adopted by the City of Seattle and affirmed by the Washington State courts for broadband companies, pursuant to which 100 percent of the cost of a pole's common space is shared by all attachers.[44] In paragraph 26 above AT&T has pointed out that the Coalition does not discuss the fact that according to the Washington ruling it cites, Seattle later revised its rate formula to the FCC telecom formula.[45]

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[44] Id. at ii, 26.

[45] See *TCI Cablevision of Washington, Inc. v. City of Seattle,* No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Superior Ct., King County), provided as Exhibit A of the Coalition's Comments. Specifically, see Conclusion of Law No. 45, slip op. at 24.

59. In further support of their contention that the separation space on a pole should be shared equally by all pole users, the Coalition points to the Delaware Public Service Commission's 1989 investigation into pole attachments, and the resulting rule which required all users of a pole to pay an equal share of the pole's support component (non-usable space).[46] It must be remembered, however, that this rule was adopted prior to the local telephone market being opened to competition by virtue of the Telecommunications Act of 1996 and the resulting explosion in telecommunications service providers. In fact, in 2006 the Delaware Public Service Commission ("PSC") reopened its pole attachment rulemaking docket, Regulation Docket No. 16, to revisit its rule pursuant to a complaint by Comcast of Delmarva, Inc. et al.[47] Although the docket was closed when Comcast withdrew its complaint, the PSC reserved the right to take further action on the matter when and as it deemed fit.[48] Delaware's willingness to reconsider its current rule does not suggest that the Delaware PSC is as wedded to the approach it adopted almost 20 years ago as the Coalition suggests.

60. The Coalition also points to the fact that in March 2006 the Indiana Utility Regulatory Commission adopted a position consistent with the Delaware's equal allocation of the non-usable space, and quotes the relevant ruling.[49] However, AT&T (with Sprint) accepted this ruling for the limited purpose of establishing a joint use rate pursuant to – and only

[46] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), pp. 30.

[47] See Delaware Public Service Commission Docket No. 16, In the Matter of the Investigation of Regulations Governing Tariffs which Set Forth Rates, Terms, and Conditions for any Attachment to any Pole, Duct, Conduit, Right-of-Way, or other Facility of any Public Utility, was first opened March 16, 1987, and reopened on April 11, 2006.

[48] See Delaware Public Service Commission Order No. 7069 dated November 21, 2006.

[49] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), p. 33.

pursuant to – their joint use agreement with the Kankakee Valley Rural Electric Membership Corporation, and would suggest it is clear that it has no broader application.

61. The Coalition fails to cite the contrary rule, also applicable to all pole users, adopted much more recently by the Oregon Public Utility Commission. Oregon has adopted what it calls a modified version of the Commission's cable rate formula,[50] determining that the appropriate way to allocate the total cost of a pole is in direct proportion to its various users' respective allocations of its useful or usable space. Oregon articulated its rule in its final form in 2007, after much debate and consideration.[51] The Vermont Public Service Board has also adopted a modified usable space formula applicable to all pole users.[52] It should be noted that both of these states chose to endorse the use and application of the FCC cable formula for all pole attachers – not just for CATV companies – well after the passage of the Telecommunications Act in 1996.

62. The argument often made by ELCOs – that this approach merely charges a pole user for the usable space it occupies – is flat-out wrong. In fact, mathematically, this approach requires a user to pay for the same percentage of the pole's non-usable space as it enjoys of the pole's usable space, which is an eminently fair and reasonable position which AT&T endorses.

63. The Coalition also points out that the Maine rule is different from both FCC formulas, allocating the cost of the non-usable space on a pole in proportion to each pole user's

[50] See letter Comments of the Public Utility Commission of Oregon, page 1 (of 6).

[51] See copy of Oregon Public Utility Commission Order No. 07-137 entered April 10, 2007, appended to its Comments.

[52] See Vermont Public Service Board Rule, §3.700, Pole Attachments (2001). The Vermont rule varies from the FCC cable formula in that it presumes 16 feet of usable space on a 40-foot pole.

"stand alone" cost – that is, the cost it would incur to set a pole for its sole use.[53] This is true, but the Maine rule is different from the FCC formulas in two additional and fundamentally important ways. First, Maine has established a 35-foot pole as the standard pole rather than a 37.5-foot pole, because Maine was persuaded that the 5 feet at the top of a 40-foot pole, that is, the full incremental height over a 35-foot pole, is dedicated exclusively to the use of the electric company on the pole, and so should be discounted for purposes of its rule in order to place the pole users in a comparable or relatively equal position with respect to the pole's unusable space. The Maine rule states in Section 1, DEFINITIONS:

> ***H. Standard Joint-Use Utility Pole.*** *A "standard joint-use utility pole" is a pole which is 35 feet long, including the portion of the pole which is in the ground.*[54]

Furthermore, Maine recognizes that the only costs a pole user should be expected to share are the costs directly associated with the type of pole needed for joint use. It specifically limits pole costs in their formula in Section 4 of the rule to the owner's investment in 30- and 35-foot poles:

> *B.* ***Use of Cost Information Applicable to Standard Poles.***
>
> *The investment, expense and revenue quantities required by this section for calculating the cost of service for a standard-size (35-foot) utility pole shall be limited to those applicable to the owner's investment in 30 and 35-foot poles.*[55]

64. Section 4.D of the rule then specifies the investments that are *not* to be included in a pole owner's costs. These include the owner's investment in any and all poles 40 feet and

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[53] Comments of the Coalition of Concerned Utilities (Allegheny Power et al.), pp. 31-33.

[54] Maine Public Utilities Commission, Me. Code R. §65-407, Chapter 880 (1997).

[55] Id.

taller. Additionally, the Maine rule expressly requires that a pole owner exclude contributions made by other pole users to its construction costs, known as contributions in aid of construction ("CIAC"), such as non-recurring capital costs associated with make-ready. The rule's exclusions are:

> *D. Investments.*
>
> *2. **Excluded Investments.** The following investments shall not be included:*
>
> *a. 40-foot, 45-foot and taller utility poles and associated guy wires, supporting anchors, poles and other supporting equipment;*
>
> *b. Guy wires, anchors, supporting poles and other supporting equipment which are used to balance only the load of the attacher's own conductors, circuits and other attachments;*
>
> *c. Conductors and circuitry, cross arms, transformers, street lighting fixtures and other attachments or appurtenances used by only one of the joint users;*
>
> *d. Investments in standard utility poles and supporting equipment for standard poles which were provided by contributions in aid of construction from customers or from other attachers, including equipment installed as part of rearrangement ("make-ready") work;*
>
> *e. Any unreasonable or imprudently-incurred investment.*[56]

65. In my initial Declaration I discussed the need for the Commission to restrict a pole owner's included costs under its formulas, as Maine has done, to such costs as are associated with providing initially and carrying annually a 37.5-foot standard wood pole. Any costs falling outside this scope, such as capital investment costs associated with the placement of poles taller than 40 feet under the Commission's methodology (35 feet in Maine), or expenses associated with the maintenance of the pole owner's plant, are incurred for the exclusive benefit of the pole owner and are therefore its exclusive responsibility.

[56] Id.

66. Maine's subtraction of CIAC from an owner's pole line account is the FCC's requirement as well. The Commission requires a pole owner to credit its pole line account with all reimbursements its receives from other parties, to the extent that those charges were initially booked to any capital account utilized to develop pole rental rates under their formulas. The FCC's requirement may be found in paragraph 27 of the FCC's 1979 Memorandum Opinion and Second Report and Order issued in the matter of pole attachments, which specifically states:

> *[W]here a utility has been directly reimbursed by a CATV operator for non-recurring costs, including plant, such costs must be subtracted from the utility's corresponding pole line capital account to insure that CATV operators are not charged twice for the same costs.* [57]

The same caveat would apply to reimbursed expenses that are included in the annual carrying charge component of the formula. AT&T believes that this proceeding presents an opportunity for the FCC to confirm that these processes are being followed by pole owners, to avoid further double dipping by the pole owner.

CONCLUSION

67. In the final analysis, the fundamental issue confronting the Commission in this rulemaking is to determine what is just, fair and reasonable, given all the conditions and parameters of joint pole use. Accidents of history and the inherent nature of electric versus telephone service have made the electric utilities the nation's pole owners. By virtue of ELCO control over a bottleneck facility and with the construction of multiple independently-owned

[57] Memorandum Opinion and Second Report and Order issued in the matter of pole attachments, Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, FCC 79-308, 72 F.C.C.2d, (May 23, 1979).

pole lines across the nation not a viable option, pole attachers, including ILECs, are at the mercy of the ELCOs.

68. Finally, the ELCOs should not be permitted to impose exorbitant rental rates and fees that accord them revenue well beyond their actual pole-related costs. The Congressional directive in Section 224 requires the costs included in the calculation to be costs that are attributable to the asset being used. This directive constrains the Commission to isolate the costs that are associated with the standard joint 37.5-foot pole, and base its methodology on such costs only, excluding all others. My initial Declaration set out in detail a reasonable approach by which the Commission could do so in a uniform, even-handed manner, and the Commission should adopt this approach rather than the self-serving proposals put forth by the ELCOs and others.

I declare under penalty of perjury that the foregoing is true and correct.

Veronica Mahanger MacPhee

EXECUTED: April 18, 2008